UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

In re: BRIDGESTONE/FIRESTONE, INC., TIRES PRODUCTS LIABILITY LITIGATION	Master File No. IP 00-9374-C-B/S MDL No. 1373 (centralized before Hon. Sarah Evans Barker, Judge)
GINA SANTANGELO, et al., Plaintiffs, v. BRIDGESTONE/FIRESTONE, INC., et al., Defendants.	Individual Case No. IP 01-5369-C-B/S

Order on Motion for Summary Judgment and Motion to Strike

This matter is before the court on defendant Bridgestone/Firestone North American Tire, LLC's ("Firestone") motion for summary judgment based on spoliation of evidence and its related motion to strike the expert affidavit and report of Kenneth Pearl and the expert report of H.R. Baumgardner. For the reasons set forth in the discussion below, the court (1) DENIES the motion for summary judgment on plaintiff Brandon Bosclair's claims against Firestone, without prejudice to Firestone's right to re-assert its motion under the circumstances set forth in this Order; and (2) GRANTS Firestone's motion to strike.

I. Facts

The tragic facts underlying this action have been the subject of an earlier summary judgment order of this court (*see Santangelo v. Bridgestone/Firestone, Inc.*, 287 F. Supp.2d 929 (S.D. Ind. 2003)) and will be repeated here only to the extent necessary to provide the factual underpinnings for the issues presented by the motions now before the Court.

On May 11, 1998, the 1996 Ford Explorer driven by plaintiff Brandon Bosclair's ("Brandon") mother overturned on a California highway, following an apparent tire tread separation. Brandon's mother and half-brother were killed. Brandon (who was a year and a half old at the time) and Gina Santangelo, his half-sister and co-plaintiff in this action, both suffered injuries.

A few days after the accident, Gina Santangelo retained attorneys Jim Gentile and John Crookham to represent her. Santangelo Dep. pp. 16-17, 60-62, 109-117; Crookham Dep. pp. 19-20.[1] Mr. Crookham then obtained the accident report of the California Highway Patrol which stated, among other things, that "[d]ue to an unknown reason the left rear tire on [the vehicle] suffered a tread separation." Slezak Declaration Ex. 3. He also obtained numerous photographs and the subject vehicle's tires. In late June of 1998, Mr. Crookham engaged H.R. Baumgardner, a tire failure analyst, to inspect the

[1]All references to the Crookham Deposition are to his June 27, 2002 deposition.

subject tires. Crookham Dep. Ex. 12. Mr. Crookham sent the accident report, photographs, and tires to Mr. Baumgardner on July 16, 1998. Crookham Dep. pp. 45-48. Mr. Baumgardner inspected the tires and other materials and reached his conclusions in early August 1998. Slezak Declaration Ex. 21.

Mr. Crookham maintains that Mr. Baumgardner reported to him in late 1998 that the subject tires did not manifest any defect. Crookham Dep. pp. 49-54. Mr. Baumgardner has testified that he orally reported to Mr. Crookham in August 1998 that the subject tire *was* defective (Baumgardner Dep. pp. 77-78), and that several months later, Mr. Crookham advised him that the file was closed. According to Mr. Baumgardner, after having stored the tires for several months and having heard from Mr. Crookham that he had closed this file, Mr. Baumgardner had the tires destroyed. *Id.* pp. 71-74; Ex. 90.

In August of 2000, the media widely reported an alleged defect in the Firestone ATX and ATX Wilderness tires. In January of 2001, Brandon (by his father), along with Gina Santangelo, engaged attorneys (not Mr. Crookham) who, on May 8, 2001, filed suit against Firestone and Ford Motor Company[2] on their behalf. These attorneys engaged Mr. Baumgardner as their tire expert, and he ultimately issued a written report, based on his inspection of the tire in August of 1998, opining that the subject tire was defective and caused the

[2]The plaintiffs earlier settled their claims against Ford Motor Company.

accident.

The plaintiffs supplemented Mr. Baumgardner's report with the report and affidavit of Kenneth Pearl. Mr. Pearl's report, except for the last paragraph, is not specific to this case but is simply the core MDL report he made in connection with the defect issue. The last paragraph contains Mr. Pearl's conclusory statement that he has "analyzed each of the Subject Tires"[3] and that they have the same defects he had addressed in his core MDL report. The plaintiffs also submitted a subsequent affidavit from Mr. Pearl in which he explains that he has reviewed the accident report, the photographs, and Mr. Baumgardner's report and notes. His affidavit concludes with the statement that the subject tire had experienced a tread separation directly related to the defects he had generally noted in his core MDL report.

II. Legal Analysis

Firestone filed two motions for summary judgment. The first asserted that Gina Santangelo's claims against it were barred by the applicable statute of limitations. (Because of Brandon's age at the time of the accident, this defense was not applicable to his claims.) The second summary judgment motion, directed to the claims of both Gina and Brandon, maintains that their claims should be barred as a matter of law because the expert retained by

[3] The court assumes Mr. Pearl meant that he had analyzed the *photographs* of the subject tires—the tires had by that time been destroyed.

Gina's prior counsel to examine the tire at issue in this case caused that tire to be destroyed before Firestone had an opportunity to do a physical examination of the tire. On related grounds explained more fully below, Firestone also has moved to strike the expert report of H.R. Baumgardner and the report and affidavit of Kenneth Pearl.

This court has already ruled that Gina Santangelo's claims are barred by the statute of limitations (*see* 287 F. Supp.2d at 936) and now takes up the sole remaining issue presented by Firestone's motions: whether Brandon's claims are barred as a matter of law as a result of the destruction of the subject tire.

Firestone maintains that the destruction of the tire warrants entry of summary judgment against Brandon on two related bases. First, Firestone asserts that without the subject tire, Brandon is unable to present evidence of defect and causation, two essential elements of his claim. Second, it argues that dismissal or preclusion of any expert evidence is the appropriate sanction for the spoliation of critical evidence and that exclusion of this evidence would also compel entry of summary judgment.

Federal Rule of Civil Procedure 56(c) provides that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "A genuine issue of fact exists only when a reasonable jury could find for the party opposing the motion based on the record as a whole." *Bellaver v. Quanex Corp.*, 200 F.3d 485, 492 (7th Cir. 2000) (citation omitted). Thus, "the existence of some metaphysical doubt as to the material facts" is not sufficient to defeat summary judgment. *Id.* The court must "construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in favor of that party." However, the nonmovant "may not simply rest on his pleadings, but must demonstrate by specific evidence that there is a genuine issue of triable fact." *Colip v. Clare*, 26 F.3d 712, 714 (7th Cir. 1994) (citation omitted).

A. Lack of Evidence of Defect and Causation

Under California law, which applies to the substantive issues in this case, Brandon must prove that the tire alleged to have failed was defective in design and/or manufacture and that the defect caused his mother's accident. *See, e.g.*, *Thomas v. Lusk*, 27 Cal.App. 4th 1709, 1716 (Cal. Ct. App. 1994) (quoting *McCreery v. Eli Lilly & Co.*, 87 Cal.App.3d 77, 83 (Cal. Ct. App. 1978)).

Firestone argues in its initial brief in support of the motion for summary judgment that without the tire, Brandon lacks any admissible evidence of these essential elements of his claim. Firestone acknowledges that Mr. Baumgardner

did examine the tires, but apparently asserts that because he destroyed them before Firestone had an opportunity to inspect them, Brandon would be relying merely on speculation regarding defect and causation. *See* Memorandum in Support at 11. Brandon counters that he *has* provided evidence of defect and causation, including Mr. Baumgardner's physical examination of the tires, multiple photographs Mr. Baumgardner took at the time of his examination, and the written report he later issued. Brandon also relies for proof of defect and causation on Kenneth Pearl's core MDL opinion as well as the affidavit he has provided in this case.

Firestone maintains that these reports are flawed because, among other things, the experts' tire analyses did not rule out other possible causes for the tread separation. However, as this court has previously explained, a plaintiff is not required to disprove all other causation possibilities in order to survive summary judgment. *Greco v. Ford Motor Co.*, 937 F. Supp. 810, 816 (S.D. Ind. 1996). The accuracy of the plaintiff's proof is a question for the jury. *See id.*

Firestone suggests—notwithstanding Brandon's expert evidence—that the absence of the allegedly defective tire entitles it to judgment as a matter of law. Although this court has determined in numerous "missing tire" cases that Firestone was entitled to summary judgment (*see*, *e.g.*, *Arroyo v. Bridgestone/Firestone*, 2003 WL 430491 (S.D. Ind. Feb. 11, 2003)), it has never held that lack of the subject tire will always compel entry of judgment for

Firestone. The absence of the allegedly defective product is not always as a matter of law fatal to a products liability claim. Under California law, defect can be proved by circumstantial, as well as direct, evidence. *See Arroyo,* 2003 WL 430491, at *2-3; (citing *Elmore v. American Motors Corp.*, 70 Cal.2d 578, 583-84 (Cal. 1969), and *Dimond v. Caterpillar Tractor Co.*, 65 Cal.App.3d 173, 177 (Cal.Ct.App. 1976)). *See also Greco*, 937 F. Supp. at 814-16. This court has, however, consistently explained that a plaintiff must have case-specific expert evidence of both defect and causation. *See, e.g., Arroyo v. Bridgestone/Firestone*, 2005 WL 1030422, at *2 (S.D. Ind. April 27, 2005). Marshaling that evidence without a tire will be difficult, but this court will not hold as a matter of law that it is in all cases impossible. In this case, Brandon has, among other things, numerous, detailed photographs[4] of the subject tire. That breadth of evidence has not been present in any of the other "missing tire" cases in which this court has granted a motion for summary judgment.[5]

In connection with the filing of its reply and surreply briefs in support of its motion, Firestone has also moved to strike the Baumgardner report and the Pearl report and affidavit, thus leaving Brandon without the requisite expert

[4] Firestone argues that these materials are not a sufficient basis for proving defect and causation because they do not show certain parts of the tire. Although these alleged deficiencies in the photographs are an appropriate subject for cross-examination, Firestone has not demonstrated that they render this evidence insufficient as a matter of law.

[5] We assume for purposes of this analysis that Brandon will be permitted to use all of this evidence at trial. As explained below, his use of a significant portion of this evidence will not be permitted. However, Brandon's ability to establish a prima facie case—though it appears

evidence of defect and causation. First, Firestone maintains that both Mr. Baumgardner and Mr. Pearl, in testimony in other cases as well as other contexts, have expressed the view that a physical inspection of the tire itself is necessary to form an opinion of defect and causation and that they should therefore not be permitted to take an inconsistent position in this case. The court has reviewed the materials Firestone has referred to in making this argument and nowhere finds in them an unequivocal assertion by either of these experts that defect and causation can never be determined without a physical inspection of the tire.[6]

Firestone also asserts that Mr. Baumgardner's report should be excluded because he failed to comply with a professional practice standard (ASTM-860) when he destroyed the tires. The court is unpersuaded by this argument. First, the evidence before the court permits the inference that Mr. Baumgardner did substantially comply with this standard. Second, apart from that observation, Firestone has not demonstrated as a legal matter that the absence of technical compliance with such a standard compels exclusion of the expert's report. Neither of Firestone's arguments provides a basis for striking

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unlikely—cannot be decided on the record now before the court.

[6] And, of course, Mr. Baumgardner *did* physically inspect the tire. We address below the prejudice to Firestone resulting from the fact that it will not have that same opportunity.

the reports of Mr. Baumgardner and Mr. Pearl.[7]

For these reasons, Firestone's motion for summary judgment based on the absence of proof of defect and causation is denied.

B. Sanction for Spoliation of Material Evidence

We now turn to the questions presented by Firestone's request that the court enter summary judgment as a sanction for spoliation of the subject tire. Firestone maintains that it is fundamentally unfair for it to be forced to defend itself, as a result of Mr. Baumgardner's destruction of the tire, without access to the tire and an opportunity to have its expert examine it. Precluding expert reports would be tantamount to dismissal because, as noted above, case-specific expert evidence of defect and causation is necessary in these cases to withstand summary judgment.

According to Firestone's primary authority, spoliation is "the destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001) (citing *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999), and *Black's Law Dictionary* 1401 (6th ed. 1990)). Here, there is no dispute that the evidence destroyed was material. A threshold question, though, is whether *Brandon*

[7] The motion to strike will, however, be granted for the reason explained *infra*.

destroyed it. Brandon destroyed the tires only if someone acting on his behalf did so. Firestone has presented no evidence that Brandon was represented by Mr. Crookham when Mr. Crookham engaged Mr. Baumgardner or that Brandon had any relationship whatsoever with Mr. Baumgardner when he destroyed the tires. The only evidence before the court is that Brandon did not hire an attorney or engage an expert until January 2001—after the tire had already been destroyed. The evidence therefore does not permit the conclusion that the tire was destroyed by Brandon or someone acting as his agent at the time of the destruction.

The spoliation inquiry does not end there, however. One who reasonably anticipates litigation has a duty to *preserve* material evidence.[8] Although Brandon is not chargeable with the actual destruction of the tire, the question therefore remains whether Brandon (through those acting on his behalf) had a duty to preserve the evidence—to take affirmative steps to ensure that Gina and her agents, who apparently had physical control of the evidence, did not lose or destroy it. Firestone has not presented evidence that Brandon reasonably anticipated litigation at any point before the tires' destruction or

[8] Federal courts are not of one accord on the choice of law issue as it relates to spoliation in diversity cases. *Compare State Farm Fire & Casualty v. Frigidaire*, 146 F.R.D. 160, 162 (N.D. Ill. 1992) (in diversity cases the substantive state law governs a party's duty to preserve evidence) *with Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001) (federal law of spoliation applies in diversity cases). We need not decide the issue here, because the court's analysis is based on a principle common to California law and federal law. Both create a duty to preserve evidence when litigation is reasonably anticipated. *See generally Willard v. Caterpillar, Inc.*, 40 Cal.App.4th 892, 922, 48 Cal.Rptr.2d 607, 625-26 (1995); *Silvestri*, 271 F.3d at 591.

that he had access to or control over the tires.

This case is therefore quite different from Firestone's primary authority, *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001) . In that case, the court's dismissal of the action as a sanction for spoliation rested on its determination that the plaintiff had taken no steps to preserve the subject vehicle or to notify General Motors of the need to examine it, despite the fact that he himself had already engaged an attorney and expert and had obtained an expert opinion. The court also noted that the plaintiff had access and control over the vehicle even though he did not own it. *See id.* at 591-92.

C. Exclusion of Evidence Based on Fed.R.Evid. 403

Although Firestone has not demonstrated any culpability on Brandon's part for the destruction of the tire meriting a sanction, the court cannot disregard the impact of Brandon's subsequent, purposeful designation of Mr. Baumgardner as his case-specific expert on defect and causation. The absence of Brandon's culpability for the spoliation does not leave unfettered his right to reap its benefits after the fact.

Fed.R.Evid. 403 provides that otherwise relevant evidence may be excluded when its probative value is substantially outweighed by the danger of undue prejudice. This court has the authority under Rule 403 to address the prejudice to Firestone occasioned by the circumstances of this case. *See*

Atlantic Mutual Ins. Co. v. CSX Expedition, 2004 WL 1746712, at *8 (S.D.N.Y. Aug. 3, 2004), vacated and remanded on other grounds, 432 F.3d 428 (2d Cir. 2005) (excluding results from testing of cargo subsequently destroyed based on Rule 403); *LaSalle National Bank v. Massachusetts Bay Ins. Co.*, 1997 WL 289115 (N.D. Ill. May 21, 1997) (excluding under Rule 403 electrical panels that had been altered); *Dean v. Watson*, 1995 WL 692020 (N.D. Ill. Nov. 16, 1995) (barring, under Rule 403, evidence relating to jacket that had been destroyed as a result of miscommunication).

If he were permitted to have Mr. Baumgardner testify as his expert, Brandon would obtain the benefit of the opinion testimony of the one and only expert in the world who can base his opinions on a physical examination of the tire. This fundamental disparity in the parties' access to the evidence on which their expert opinions would be based is decidedly prejudicial to Firestone. On the basis of Rule 403—and not as a "sanction"—the Court will fashion an order that puts the parties on a level playing field with respect to the physical evidence in this case and that ensures both parties can make full use of that evidence.

The Court hereby determines that Mr. Baumgardner's expert report in this action is STRICKEN and that Mr. Baumgardner is precluded from providing any expert testimony or opinions in this action or any other evidence based on his physical examination of the tire, other than for purposes of

authenticating the photographs he took. Moreover, because Kenneth Pearl admittedly based his opinion at least in part on Mr. Baumgardner's expert report and the notes from his physical examination of the tire,[9] Mr. Pearl's report and affidavit are STRICKEN, and he is likewise precluded from providing any expert testimony or opinions in this action or any other evidence based on Mr. Baumgardner's physical examination of the tire.

The evidence available to the parties for purposes of obtaining case-specific expert opinion is obviously limited as a result of this ruling. It will consist of the photographs, the police report, and any other physical evidence or data equally available to both parties (but not that recorded by Mr. Baumgardner). The court has serious doubts that the plaintiff will be able to obtain an expert opinion on defect and causation that will survive a *Daubert* or summary judgment challenge.[10] Nevertheless, the court cannot determine on this record that it will be impossible, and it would be inappropriate for Brandon, who has not engaged in sanctionable conduct, to be denied the opportunity to seek such an opinion.

This court will therefore give Brandon 90 days from the date of this Order to obtain and serve on counsel for Firestone a case-specific expert report on

[9] Pearl Affidavit ¶ 2.

[10] For example, Kenneth Pearl has testified in this case that he would need more than the photographs to perform an analysis. Pearl Dep. at 63-69.

defect and causation consistent with the limitations of this order, and to file a notification with the court that he has done so. The court's denial of Firestone's motion for summary judgment is without prejudice to its ability to re-assert its right to judgment as a matter of law after such service.[11] If the plaintiff has not served a new expert report as provided by this order, the court will dismiss his action with prejudice under Fed.R.Civ.P. 41(b) and will enter final judgment for Firestone.

III. Conclusion

For all of the above reasons, the Court DENIES the motion for summary judgment as to plaintiff Brandon Bosclair's claims against Firestone, and GRANTS Firestone's motion to strike. The plaintiff is given 90 days from the date of this order to obtain and serve on counsel for Firestone a case-specific expert report on defect and causation under the limitations of this order, and to file a notification with the court that he has done so.

It is so ORDERED this ____ day of March, 2007.

[11] Any subsequent motion for summary judgment filed by Firestone should focus only on the new evidence and should not repeat the legal arguments it has previously made. It should also not revisit the sanctions issue.

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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